

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Lon Neuville
1000 Main St
Green Bay WI 54301-4716

PECFA Claim #54303-3557-15
Hearing #95-68

Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing filed April 21, 1995, under §101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce (Department), a hearing was commenced May 6, 1996, at Madison, Wisconsin. A Proposed Decision was issued on June 25, 1999, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

Whether the Department has sustained its burden of proving by clear and convincing evidence that its original decision disqualifying Lon Neuville's Petroleum Environmental Cleanup Fund Act (PECFA) reimbursement claim based on s. 101.143 (4)(g) 2 Stats., on the basis of submission of a fraudulent claim, was correct.

There appeared in this matter the following persons:

PARTIES IN INTEREST:
Lon Neuville
1000 Main Street
Green Bay, Wisconsin 54301-4716

By: Dennis P. Birke, Esq.
DeWitt Ross & Stevens, S.C.
Two East Mifflin Street
Suite 600
Madison, Wisconsin 53703-2865

Department of Commerce
PECFA Bureau

201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Kristiane Randal, Esq.
Assistant Legal Counsel
Department of Commerce
201 W. Washington Ave., Rm.321A
PO Box 7838
Madison WI 53707-7838

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated May 12, 1999.

The matter now being ready for decision, I hereby issue the following

FINDINGS OF FACT

The Findings of Fact in the Proposed Decision dated June 25, 1999 are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Decision dated June 25, 1999 are hereby adopted for purposes of this Final Decision.

DISCUSSION

The Discussion in the Proposed Decision dated June 25, 1999 is hereby adopted for purposes of this Final Decision.

FINAL DECISION

The Proposed Decision dated June 25, 1999, is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for Judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: July 26, 1999

Terry W. Groseriidrer
Executive Assistant
Department of Commerce
PO Box 7970
Madison WI 53707-7970

copies to:
Lon Neuville
1000 Main Street
Green Bay, Wisconsin 54301-4716

Dennis P. Birke, Esq.
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Two East Mifflin Street
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Joyce Howe, Office Manager
UI Madison Hearing Office
1801 Aberg Ave Suite A
Madison WI 53707-7975

Kristiane Randal
Assistant Legal Counsel
Department of Commerce
201 W. Washington Ave., Rm. 321 A
PO Box 7838
Madison WI 53707-7838

Date Mailed: July 28, 1999

Mailed By:

**STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS**

IN THE MATTER OF: The claim for
Reimbursement under the PECFA

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975

Program by

Madison, WI 53707-7975

Telephone: (608)242-4818

Fax: (608) 242-4813

Lon Neuville

Hearing Number: 95-68

Re: PECFA Claim # 54303-3557-15

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the -proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Christopher Mohrman, Deputy Secretary of the Department of Industry, Labor and Human Relations, who is the individual designated to make the FINAL Decision of the Department of Industry, Labor and Human Relations in this matter.

Upon mailing of this decision, the file materials are being sent to the office of the secretary of the Department of Commerce, to facilitate issuance of a final decision in a timely manner. Any objections to the proposed decision, and any further correspondence on this matter, should be directed to that office.

STATE HEARING OFFICER:
Karen L. Godshall

DATED AND MAILED:
June 25, 1999

MAILED TO:

Appellant Agent or Attorney

Dennis P. Birke
DeWitt Ross & Stevens
2 East Mifflin St. Suite 401
Madison, WI 53703-2865

Department of Industry, Labor
and Human Relations

Kristiane Randal
Department of Commerce
P.O. Box 7838
Madison, WI 53707-7838 (608) 267-4433

jtl

State of Wisconsin
DEPARTMENT OF COMMERCE

In the matter of the
Request for Reimbursement Pursuant

To the Provisions of the PECFA Program

Hearing Number 95-68
PECFA Claim Number 54303-3557-15

Lon Neuville, Appellant

vs.

Wisconsin Department of Commerce

A decision was issued on March 23, 1995, by the Department of Industry, Labor and Human Relations, denying any PECFA payment to Lon Neuville (hereinafter, the claimant) on the basis that the claimant had submitted a fraudulent PECFA claim. The claimant appealed from that denial, and sought a hearing on the claim.

Administration of the PECFA Program was subsequently transferred to the newly-created Wisconsin Department of Commerce. The secretary of that department delegated administrative law judge Karen L. Godshall, of the Wisconsin Department of Workforce Development (previously the Department of Industry, Labor and Human Relations) to hear the appeal.

Prior to the holding of any hearing, the claimant, by his attorney, and the Department of Commerce, by its assistant legal counsel, prepared a stipulation of facts to be used in lieu of evidence presented at hearing as a basis for resolution of the matter.

Based on the stipulation of facts, and a variety of briefs from the parties submitted in late 1996 and early 1997, a proposed decision was issued in April of 1997. That decision was adopted by the Department of Commerce as its final decision in March of 1998. The claimant then filed a petition for judicial review in Dane County Circuit Court. In December of 1998, the court issued a decision negating the prior decision and remanding the matter to the department for "reconsideration of the evidence under the correct heightened standard of proof." The department once again delegated administrative law judge Karen L. Godshall to issue a proposed decision, and delegated the executive assistant of the department to issue a final decision.

The parties have now had an opportunity to submit further briefs in the matter, and those briefs were received on June 11, 1999. The matter is now again ripe for decision.

Based on the previous stipulation of facts, and the briefs submitted prior to the earlier decisions, together with the June 11, 1999 briefs, the state hearing officer now makes the following

PROPOSED SUMMARY OF FACTS

(NOTE: The following summary of facts does not replace the stipulation of facts, which is adopted by the state hearing officer and incorporated by reference herein. The following is

merely a brief summary of the background of the case, added to facilitate later discussion of the issues. The summary is taken from the prior proposed decision.)

The claimant is the owner of an automobile dealership. During the course of ongoing construction work in the vicinity of his business, it was learned that there was contamination on his property from underground storage tanks. A contractor dealing in soil excavation and remediation (hereinafter "LeSage") approached the claimant and offered to do the necessary work to clean the site. The contractor also explained to the claimant that state funds from the PECFA program would be available to assist with the cleanup costs, but that the program required the property owner to pay a \$5000 deductible fee, which could not be reimbursed by the program. LeSage suggested to the claimant that the contractor's claims could be overstated in terms of the tonnage of soil removed, to offset the deductible, so that the claimant would not be liable for any payment.

The claimant rejected LeSage's suggestion and proposed instead that LeSage purchase from him a vintage automobile at a substantially inflated price. The profit on that transaction would then be enough to allow for payment of the deductible. LeSage agreed with the proposal. The automobile transaction was completed, and the contractor, along with another general contractor, proceeded with the cleanup work at the claimant's site.

After the cleanup work was completed, LeSage prepared the paperwork for submission of the PECFA claim. The claimant signed and submitted the claim. The portion of the claim relating to the work of LeSage's business included overstated costs of approximately \$49,000. The claimant had no actual knowledge that those overcharges were included in his submission.

ISSUE

The issue now presented is whether the department has sustained its burden of proving by clear and convincing evidence that its original decision disqualifying Lon Neuville's Petroleum Environmental Cleanup Fund Act (PECFA) reimbursement claim based on §101.143(4)(g)2, Stats., on the basis of submission of a fraudulent claim, was correct.

PROPOSED DISCUSSION AND CONCLUSIONS

The burden is upon the department to establish by clear and convincing evidence that payment should be denied to the claimant on the basis that he submitted a "fraudulent claim". The phrase "fraudulent claim" is not defined in the PECFA program statutes or rules. However,

it is clear that in order for there to be submission of a fraudulent claim, several factors must be shown. First, it must be clear that the claimant submitted the claim, and that it included fraudulent elements, such as overcharges. Those factors are not in dispute here. It must also be shown that the claimant knew that the claim was fraudulent or that the claimant submitted the claim with reckless disregard as to whether it was fraudulent. This is not necessarily equivalent to finding that there was a specific intent to defraud.

Since the stipulated facts make clear that the claimant did not affirmatively know that the claim he submitted was fraudulent, the question is then whether he acted with reckless disregard of the possibility of fraud inherent in the claim. Again, that issue must be resolved in large part by looking to the stipulated facts. Those facts, insofar as they relate to the claimant's dealings with LeSage, clearly establish that the claimant knew that LeSage was willing to submit a fraudulent claim. The original proposal put forward by LeSage provided a means whereby LeSage would be made whole and the claimant would not be required to absorb any of the legally-required deductible costs. The claimant, while rejecting LeSage's specific proposal, himself put forward an alternative solution under which he would again be absolved from paying for any of the deductible costs, a proposal which flew in the face of normal business practice and was unreasonable on its face. His involvement in that transaction convincingly establishes that he was willing to take whatever actions were necessary, and to engage in whatever subterfuge might be called for, in order to avoid paying his requisite share of the cleanup costs. Based on that, he must be held to have known that LeSage would then undertake some plan by which it could be made whole and under which it would not have to actually cover the deductible costs which were the claimant's original responsibility. Despite that knowledge, the claimant made no significant effort to monitor or assess whether the claim, as prepared by LeSage, was accurate or not. His failure to do so, in view of the all the attendant circumstances, made him a willing participant in the attempt to defraud the PECFA program. The stipulated facts, and the inferences which can be drawn from them, clearly and convincingly establish that the claimant acted in reckless disregard of his obligations under the PECFA program and in so doing, submitted a fraudulent claim.

The state hearing officer therefore finds that Lon Neuville submitted a fraudulent claim to the PECFA program, within the meaning of § 101.143 (4)(g)2 of the statutes.

PROPOSED DECISION

The department's decision to deny payment to Lon Neuville, as set forth in its original decision of March 23, 1995, is affirmed.

Karen L. Godshall
State Hearing Officer

Dated and mailed this 25th day of June, 1999

STATE OF WISCONSIN **Department of Commerce**

In the Matter of the PECFA Appeal of

Lon Neuville
1000 Main St
Green Bay WI 54301-4716

PECFA Claim #54303-3557-15
Hearing 995-68

Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing filed April 21, 1995, under § 101.02(6)(c), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce, a hearing was commenced on May 6, 1996, at Madison, Wisconsin. A proposed decision was issued on April 28, 1997, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

Whether, given the stipulated facts, the claimant may be held to have submitted a fraudulent PECFA claim, thus barring payment to him on that claim, pursuant to section 101.143 (4)(g)2 of the statutes, which provides that the department shall deny a claim if the claimant "submits a fraudulent claim".

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Lon Neuville
1000 Main St
Green Bay WI 54301-4716

By: Paul G. Kent
Dewitt Ross & Stevens
2 E Mifflin St Ste 401
Madison WI 53703-2865

Department of Commerce
PECFA Bureau
201 East Washington Avenue
P.O. Box 7838
Madison WI 53707-7838

By: Kristiane Randal
Department of Commerce
201 W. Washington Ave., Rm. 623
P O Box 7970

Madison WI 53707-7970

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated February 6, 1997.

The matter now being ready for decision, I hereby issue the following

FINDINGS OF FACT

The Findings of Fact in the Proposed Decision dated April 28, 1997 are hereby adopted for purposes of this final decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the proposed Decision dated April 28, 1997 are hereby adopted for purposes of this final decision.

DISCUSSION

The Discussion in the Proposed Decision dated April 28, 1997 is hereby adopted for purposes of this final decision.

FINAL DECISION

The Proposed Decision dated April 28, 1997, is hereby adopted as the final decision of the department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, P.O. Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted, The process for asking for a new hearing is in Sec. 227.49 of the state statutes.

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 123 W. Washington Avenue, 9th Floor, P.O. Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227-53 of the statutes.

Dated: March 30, 1998

Christopher C. Mohrman
Executive Assistant
Department of Commerce
P O Box 7970
Madison WI 53707-7970

cc: Paul G. Kent
Kristiane Randal
Dispute Resolution Coordinator, PECFA

Date Mailed: April 1, 1998

Mailed By: Ellen

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

**IN THE MATTER OF: The claim for
reimbursement under the PECFA
Program by**

Lon Neuville
1000 Main Street

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608)242-4818
Fax: (608)242-4813

Green Bay-, WI 54301-4716

Hearing Number: 95-68

Re: PECFA Claim # 54303-3557-15

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Christopher Mohrman, Deputy Secretary of the Department of Commerce, who is the individual designated to make the FINAL Decision of the department in this matter.

STATE HEARING OFFICER:

Karen L. Godshall

DATED AND MAILED:

April 28, 1997

MAILED TO:

Appellant Agent or Attorney

Paul G. Kent
Dewitt Ross & Stevens
Two East Mifflin Street #401
Madison, WI 53703-2865

Department of Commerce

Kristiane Randal, Assistant Legal Counsel
Department of Commerce
P.O. Box 7969
Madison, WI 53707-7969
(608) 267-4433

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

In the matter of the

REQUEST FOR REIMBURSEMENT PURSUANT
TO THE PROVISIONS OF THE PECFA PROGRAM

Hearing Number 95-68

PECFA Claim Number 54303-3557-15

Lon Neuville, Appellant

vs.

Wisconsin Department of Commerce

A decision was issued on March 23, 1995, by the Department of Industry, Labor and Human Relations, denying any PECFA payment to Lon Neuville (hereinafter "the claimant") on the basis that the claimant had submitted a fraudulent claim. The claimant appealed from that denial, and sought a hearing on the claim.

Administration of the PECFA Program was subsequently transferred to the newly-created Wisconsin Department of Commerce. The secretary of that department delegated administrative law judge Karen L. Godshall, of the Wisconsin Department of Workforce Development (previously the Department of Industry, Labor and Human Relations) to hear the appeal.

Prior to the holding of any hearing, the claimant, by his attorney, and the Department of Commerce, by its assistant legal counsel, prepared a stipulation of facts which is to be used in lieu of evidence presented at hearing as a basis for the resolution of the matter.

Based on the stipulations of fact, which were filed in July of 1996, together with supplemental stipulations which were filed in December of 1996, together with the briefs of the parties, filed in December of 1996 and January of 1997, the state hearing officer makes the following

PROPOSED SUMMARY OF FACTS

(NOTE: The following summary of facts does not replace the stipulations of fact, which are adopted by the state hearing officer and incorporated by reference herein. The following is merely a brief summary of the background of the case, added to facilitate later discussion of the issues.)

The claimant is the owner of an automobile dealership. During the course of ongoing construction work in the vicinity of his business, it was learned that there was contamination on his

property from underground storage tanks. A contractor dealing in soil excavation and remediation (hereinafter "LeSage") approached the claimant and offered to do the necessary work to clean the site. The contractor also explained to the claimant that state funds from the PECFA program would be available to assist with the cleanup costs, but that the program required the property owner to pay a \$5000 deductible fee, which could not be reimbursed by the program. LeSage suggested to the claimant that the contractor's claims could be overstated in terms of the tonnage of soil removed, to offset the deductible, so that the claimant would not be liable for any payment.

The claimant rejected LeSage's suggestion and proposed instead that LeSage purchase from him a vintage automobile at a substantially inflated price. The profit on that transaction would then be enough to allow for payment of the deductible. LeSage agreed with the proposal. The automobile transaction was completed, and the contractor, along with another general contractor, proceeded with the cleanup work at the claimant's site.

After the cleanup work was completed, LeSage prepared the paperwork for submission of the PECFA claim. The claimant signed and submitted that claim. The portion of that claim relating to the work of LeSage's business included overstated costs, of approximately \$49,000. The claimant had no actual knowledge that those overcharges were included in his submission.

ISSUE

The issue presented is whether, given the stipulated facts, the claimant may be held to have submitted a fraudulent PECFA claim, thus barring payment to him on that claim, pursuant to section 101.143 (4) (g) 2 of the statutes, which provides that the department shall deny a claim if the claimant "submits a fraudulent claim".

PROPOSED DISCUSSION AND CONCLUSIONS

The burden is upon the department to establish that payment should be denied to the claimant on the basis that he submitted a "fraudulent claim". The phrase "fraudulent claim" is not defined in the PECFA program statutes. The parties, in their respective briefs, have proposed a variety of standards to be used in assessing whether a fraudulent claim has been submitted. It is clear from the statutes and cases cited by both parties that the standard for fraud should be less than an absolute standard. That is, merely because the claim documents contain errors as to the amount of reimbursement or other misstatements, such errors do not prove the existence of a fraudulent claim. A different standard of proof is required.

In order for a claimant to be held to have submitted a fraudulent claim, the claimant must either know that the claim as submitted is fraudulent or have some basis for believing the claim is or may be fraudulent and then act in disregard of that belief.

In this case, the claimant knew that one of the contractors involved was willing to submit a fraudulent claim, based on his discussions with LeSage. The original proposal put forth by LeSage provided a means whereby LeSage would be -made whole and the claimant would not be required to absorb any of the deductible. The claimant now argues that, since he rejected that proposal, he had no further reason to question LeSage's actions or the documents which LeSage prepared. This interpretation simply strains credulity. The claimant himself proposed an alternative means by which he would be absolved of paying for any of the deductible, and the contractor accepted that proposal. The claimant must have known that the contractor would then undertake some other plan by which it could be made whole and under which it would not have to actually cover the claimant's deductible. In light of that knowledge, the claimant had an affirmative obligation to review the claim documents prepared by the contractor in order to ensure that the claim was not a fraudulent one. His failure to do so, in view of all of the attendant circumstances, made him a willing participant in the attempt to defraud the PECFA program. His submission of the claim documents, with their overstated charges, therefore constituted submission of a fraudulent claim.

The department also argues that the claimant's inclusion of full costs in the claim, without notice that his actual costs were reduced because of the offsetting agreement with regard to the deductible, constituted a separate act of fraud. However, given the fact that it was not illegal for a contractor to absorb the deductible at that point in time, this secondary contention cannot be sustained. Fraud is to be found on the basis of the actions described in the foregoing paragraphs, and not on this theory.

The state hearing officer therefore finds that Lon Neuville submitted a fraudulent claim, within the meaning of section 101.143(4)(g)2 of the statutes.

PROPOSED DECISION

The department's decision to deny payment to Lon Neuville, as set forth in the decision of March 23, 1995, is-affirmed.

APPEAL TRIBUNAL

Karen L. Godshall
State Hearing officer

Dated and mailed this 28TH day of APRIL 1997

PECFA 95-68/tmt